1965

Mortgage Investment Co., Inc v. Spencer W. Toone : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

MORTGAGE INVESTMENT CO., INC., a Utah Corporation,
Plaintiff-Respondent,

vs.

SPENCER W. TOONE,
Defendant-Appellant.

Case No. 10311

BRIEF OF RESPONDENT

Appeal from a Judgment of the Third District Court
For Salt Lake County
Honorable Stewart M. Hanson

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BRIEF OF PLAINTIFF-RESPONDENT MORTGAGE INVESTMENT CO., INC.

STATEMENT OF THE KIND OF CASE

This is an action brought by the assignee of a seller in a Uniform Real Estate Contract against a buyer for delinquent payments due under the contract.

DISPOSITION OF THE LOWER COURT

On December 17, 1964, Plaintiff moved the court for a Summary Judgment on the grounds that there was no genuine issue as to any material fact and that Plaintiff was entitled to judgment as a matter of law. This motion was based on the pleadings on file in the subject case and the deposition of the Defendant. The court took the matter under advisement and on December 22, 1964 rendered judgment against Defendant and in favor of Plaintiff, for the unpaid payments, attorney's fees and costs.

RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks affirmance of the judgment rendered against Defendant-Appellant on December the 22nd, 1964.

STATEMENT OF FACTS

On or about December the 6th, 1962, the Defendant, Mr. Toone, executed as buyer a Uniform Real Estate Contract. In December of 1962, Mr. Toone came to Plaintiff's office at the request of Gregerson, President of Plaintiff, R37-7. Before Plaintiff purchased the subject contract, Mr. Gregersen wished to see and talk with the purchaser, R37-3. Plaintiff purchased the contract from the seller thereon and was assigned the seller's interest, R-31. The

contract provided for two payments a year, one in May and one in October .The May payment of approximately $3,925.00 became due and was not paid and Plaintiff filed an action against Mr. Toone on June the 26th, 1963, R1. After the action was commenced, Mr. Toone came to Plaintiff's office to request time in which to make the first payment, R37-8. Plaintiff agreed that Mr. Toone could have a certain time in which to pay $1,500.00 of the payment or file an answer, R37-8 & 9. The time requested by Mr. Toone expired and the Default Certificate of Mr. Toone was entered on August the 13th, 1963, R3. Ten days later, R4, judgment by default against Mr. Toone was taken by the Plaintiff, R4. Mr .Toone retained counsel and motion was made to set aside the default judgment, R5, which motion was granted on September 26, 1963, R7, and Defendant was allowed an extra ten days in which to file an answer. On October the 8th, 1963 another default judgment was entered against Defendant in this matter, R10. A stipulation was entered into between counsel on December the 2nd, 1963, R18, and on December 13th, 1963, pursuant to this stipulation, an Order was entered setting aside the second default judgment. On December the 17th, 1964, a pre-trial conference was held before the Honorable Stewart M. Hanson, R-21. At this time Plaintiff moved for a Summary Judgment based upon the pleadings on file and the deposition of Mr. Toone. The court took the matter under advisement, R23, and on December 22nd, 1964 Judgment was

entered in favor of Plaintiff and against Defendant, R25. From this Judgment Defendant appeals.

ARGUMENT

1. *The facts essential to Plaintiff-Respondent's claim against Defendant-Appellant are undisputed.*

Mr. Toone admits in his answer, R19, that he executed the subject contract as buyer; however, he denies "for lack of knowledge" Plaintiff's allegation of assignment. The Affidavit of R. George Gregersen, R31, is evidence of the said assignment and nowhere does Defendant deny the assignment. The first three pages of the deposition of Defendant, Mr. Toone, R37, set the tone for the studied evasion of Defendant throughout this lawsuit. Although Mr. Toone is less than open in his deposition for many pages, as pointed out in Appellant's brief, he "suspected" the assignment. Mr. Toone admitted in his deposition that he had not paid any money under the subject contract: (page 6, line 14 through 24)

> "Q. (By Mr. Amoss) Mr. Toone, do you owe any money on that contract? Well, let's put it this way, have you made any payments under this contract?
>
> A. No.
>
> Q. There is no question you signed the contract, is there, you don't deny that?
>
> A. No.

Q. Now the payments called for are set forth in the contract, are they not?

A. (No response).

Q. You haven't made any payments to *anyone* under the contract? (Emphasis supplied).

A. No."

Simple computations show that the amount awarded under the judgment appealed from hereunder by the Third District Court is correct.

2. *The record fails to disclose facts to substantiate defense raised by Mr. Toone in his answers.*

As an affirmative defense, Mr. Toone alleged "that the interest that he acquired in the contract which is the subject of this action has been been assigned to a third party, O. A. Tatro, and the obligation of making payments on the said contract are those of the said O. A. Tatro and not the obligation of this Defendant." Defendant in his Affidavit dated August the 23rd, 1963, R-6, stated "that *since* he entered into the contract described in the complaint herein, he *has* assigned all of his title and interest in same to O. A. Tatro of Salt Lake City, Utah, and which party should also be made a part of this lawsuit as the party required to perform under the contract in view of the assignment to him." The assignment, if any existed, was obviously made after the execution by Defendant of the subject contract. Nowhere in the pleadings or Defendant's deposition is the faintest hint that Plaintiff

had any knowledge of the supposed assignment, until Appellant's brief, where all sorts of vague, but somehow naughty things are darkly hinted at. It is Hornbook law that an assignor cannot assign liabilities.

3. *The record fails to disclose facts to substantiate defenses raised at the pre-trial conference.*

At the pre-trial conference Defendant raised several new and interesting defenses: (1) "There was no consideration given for the execution of the contract. It is the Defendant's position that since Defendant paid nothing upon the execution of the same there was no consideration"; (2) "That there is another outstanding agreement covering the same property between the same parties and it is not clear which of the two contracts is pertinent as far as any cause of action between the parties is concerned," and (3) "The Plaintiff well knew during all the time set out in the complaint herein and amended complaint that the Defendant was not the true buyer of the property, that he was acting for a third party and that the action should include him as a party Defendant."

Defendant's first contention is so assinine that no comment need be made thereon.

The next defense is quite preposterous when viewed in light of the admissions contained in the record. While attempting to fathom whatever defense there might conceivably be, Plaintiff learned for the first time while taking Defendant's deposition that

Defendant's counsel was in possession of two contracts purporting to sell the same property by the same seller to the same buyer, R-37-11 et sequiter. This was done for the purpose of "Manipulation," R-37-15, although what or who was to be manipulated was not explained by Defendant. *The existence of the second contract was not made known to the Plaintiff,* R-37-13. As a matter of fact, Defendant's deposition would seem to indicate that far from being a defense, the matter of the two contracts indicates that all parties concerned, with the exception of Plaintiff, *i.e.*, officers of the seller corporation, Defendant buyer and the ubiquitous Mr. Tatro, were quite closely connected and one might even say "thick."

Nowhere in the record could even the wildest imagination snatch statements out of context that would support Defendant's third contention at the pre-trial as set forth above. 3 Am. Jur. 2d 575, Section 192, states the well-established law of Agency governing this set of facts:

> "If there is no proper indication in the instrument that the person signing does so as agent, that is, if the principal's name does not appear in the instrument as principal of the person signing, the agent is personally liable on a contract signed in his own name. Even where an agent discloses the name of his principal, if he signs a contract in his own name only, he will be personally bound thereby where the contract does not show upon its face that he is acting for another."

4. *The record fails to disclose facts to substantiate defenses raised on Appeal.*

A. Upon Appeal, Appellant raised for the first time the point that Plaintiff did not actually prove that Defendant had actual knowledge of the assignment from seller to Plaintiff.

The record is replete with admissions that Appellant had actual knowledge of the claimed assignment between the seller and Respondent. As pointed out above, the Affidavit of Mr. Gregersen on behalf of the Plaintiff, R-31, was evidence in the record of said assignment. Defendant in his deposition admits that at Plaintiff's request a meeting was held in Plaintiff's office. On page four of his deposition Mr. Toone "suspected" that the subject contract had been purchased by the Plaintiff. Amply aided by counsel, Defendant was able to side step the questions put to him for four or five pages, however, he does admit, that after "suspecting" that the contract had been assigned to Plaintiff by Northwestern Investment Corporation, *he had approached Plaintiff for more time to make a payment.* Mr. Toone's statements in his Affidavit, R-6, his position clearly set forth in the answers filed by him, and his statements in the deposition leave no room for an inference that Mr. Toone meant to make a payment to anyone other than Plaintiff and in fact the record makes crystal clear the fact that there was no doubt in Mr. Toone's mind that Plaintiff was the party to whom payments should have been made.

B. Upon Appeal, Appellant raised for the first time the ingenious defense of Novation.

In Appellant's brief on appeal we learn for the first time that Appellant has decided to try a new defense and aptly termed it Novation. If it were not indeed a very serious matter to one's client to have a matter on Appeal, this argument of Appellant's would be ludicrous to the nth degree. Appellant in effect states that if there had been a novation in this matter there would have been a novation. Appellant with lowered eyebrows darkly refers to "several inferences that support a Novation, (1) "the apparent understanding of Appellant that he was a mere nominee and would not be liable on assignment," (I again refer this Court to R-6, the Affidavit of Mr. Toone, "that *since he entered into the contract* described herein, he has assigned all his right, etc.", (2) "the fact that Respondent was apparently involved along with Tatro in the original negotiation." (Is counsel referring to the meeting held in the offices of Plaintiff after suit had been filed, R-37-8, or does counsel know more of the original negotiation than he would allow his client to testify upon deposition?); (3) "the fact that two contracts were executed. The latter fact itself could be the basis for a novation and preclude an action on the instant contract." (Counsel must mean the two contracts executed the same day for the sale of the same property between the same parties, but the sales price of one being $39,500.00 and the sales price of the second being $13,500.00 greater, which "manipulation" Mr.

Toone was involved in up to his eyebrows and which fact was not revealed to Plaintiff, R-37-13.) That this extraordinary set of facts should be brazenly pressed upon this court as grounds for suspicion of a novation, and therefore a defense to the contract, needs far more gall than existed even in Caesar's time.

CONCLUSION

Appellant submits that this Court should afford Appellant the right to have the factual basis of his claims determined. "The record as it now exists is at best sketchy and obscure." This writer submits that the record, in so far as it provides facts to support Appellant's defenses, is neither sketchy nor obscure — the facts are non-existent. The record shows a straightforward case of a purchaser under a contract who could not make payments. The trial court quite rightly concluded that Plaintiff was entitled to judgment in the amount of the payments due. The only defenses dredged up by Appellant from time to time have been either preposterous under the law or mere inuendo. There is nothing in the record to aid the Appellant's grasp at straws. "We do not feel that Appellant can be permitted to draw favorable inferences from these facts. Inferences are made for the purpose of aiding reason, not to override it. Inferences are nothing more than the probable or natural explanation of facts. Common sense and reason dictate that evil inferences should not be permitted to be drawn from routine business trans-

actions where there are no other circumstances. To hold otherwise would throw the door open for attack on each and every transaction that one might enter into." Holland vs. Columbia Iron Mining Company, 4 Utah 2d 303, 293 Pac 2d 700 (1956).

Apparently Appellant would like this Court to believe that in this case there are many facts that don't meet the eye. If such facts do exist, why are they not in the record? In AbdulKhadir vs. Western Pacific Railroad Co., 7 Utah 2d 53, 318 Pac 2d 339, (1957), this court said:

> "The first attack plaintiff makes upon the summary judgment is that the procedure is too hasty. He says that if the case had been allowed to come to trial in its regular turn on the calendar, he might have been able to produce another witness or witnesses. This contention is without merit. The accident happened over a year before the motion for summary judgment was entered. There was no reasonable assurance that the witness referred to, a resident of California, might be found within a reasonable time, or at all, nor that his testimony would help plaintiff if available. Speaking generally, it is to be assumed that when a plaintiff files his action, he has sufficient evidence to demonstrate a right to recover. All he is entitled to is a reasonable opportunity to marshal and present such evidence."

It is respectfully submitted that a perusal of the record herein indicates that no reasonable doubt can exist that the appeal in this matter is taken solely for

delay, in all respects is frivolous, and Respondent suggests that this Court has the discretionary power to award further damages to Respondent in the sum of 25% of the judgment herein appealed from; Respondent therefore respectfully requests this Court to affirm the trial Court and to award Respondent further damages because of this frivolous appeal.

Respectfully submitted,

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